UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK LP, LLLP, Plaintiffs/Counterclaim Defendants, v. CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION, Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs, v. TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP, Third-Party Defendants.	06 Civ. 4092 (DC)

MEMORANDUM OF LAW IN SUPPORT OF TURNER'S MOTION FOR SUMMARY JUDGMENT

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Plaintiffs/Counterclaim Defendants The Cartoon Network LP, LLLP ("The Cartoon Network") and Cable News Network LP, LLLP ("CNN"), and Third-Party Defendants Turner Broadcasting System, Inc. ("TBS"), Turner Network Sales, Inc. ("TNS"), Turner Classic Movies LP, LLLP ("TCM") and Turner Network Television LP, LLLP ("TNT") (collectively "Turner"), submit this memorandum in support of Turner's motion for summary judgment on Counts I and II of Plaintiffs' complaint against Defendants/Counterclaim Plaintiffs CSC Holdings, Inc. and Cablevision Systems Corporation (collectively, "Cablevision"), and on Cablevision's counterclaims and third-party claims against Turner.

PRELIMINARY STATEMENT

This is a straightforward case of copyright infringement. Cablevision intends to launch a service (the "RS-DVR Service" or the "Service") pursuant to which it would reproduce and transmit Turner's copyrighted television programming without a license. Cablevision's RS-DVR Service would enable Cablevision's subscribers to request that Cablevision make copies of programming and later transmit that programming for viewing on demand. The law is clear that such unauthorized reproduction and transmission would be illegal. In common parlance, this is an open-and-shut case. The only twist in what is so clear a case is the defense asserted by Cablevision: that it is allegedly the subscriber, not Cablevision, who is making the copies; and therefore that Cablevision cannot be held liable for infringing on Turner's copyrights. To make this point, Cablevision repeats the mantra "it's just like a DVR". Repetition does not render true what the facts demonstrate is not. For Cablevision to prevail would require the Court to accept an unprecedented and legislatively unrecognized exception to the copyright laws that would insulate Cablevision from liability, despite Cablevision's conceded role as the designer, creator, operator and marketer of the very service that physically makes and transmits the copies, and without which the infringements could not occur.

The illogic of Cablevision's position is apparent from a few indisputable facts. Cablevision personnel, including systems administrators, customer-service personnel and marketers, handle all aspects of the physical operation and promotion of the Service, not the subscriber. Cablevision itself must physically receive, modify and process the signal from the programming provider in order for the programming to be copied onto servers owned by Cablevision; the subscriber plays no role in this process and could not participate in it if he or she wanted to. All of the particular equipment necessary to record the programming and transmit it to the subscriber for viewing resides at Cablevision's facilities and is within Cablevision's custody and control, not the subscriber's. And of course the programming itself is only available through Cablevision; the subscriber has no direct relationship with the programming providers. (*See infra* pp. 7-8.)

Cablevision's conduct here is a blatant abuse of its access to Plaintiffs' copyrighted programming. Plaintiffs have provided Cablevision with access to their programming for a limited licensed use — to transmit the programming to Cablevision's subscribers as a real-time network feed (*i.e.*, transmitted when and as received). Cablevision's unlicensed, wholesale copying of that content as part of the RS-DVR Service takes unlawful advantage of that access.

Plaintiffs, as the copyright-holders, retain the exclusive right to decide what uses to make of their copyrighted programming and how to exploit it. In addition to licensing that programming as linear (*i.e.*, regular) network feed, Plaintiffs license their copyrighted programming in numerous ways. (*See infra* pp. 3-4.) Notably, other cable operators, but not Cablevision, have sought and obtained from Plaintiffs licenses for transmission of programming on a "video on demand" (VOD) basis. As discussed below, Cablevision's RS-DVR Service is similar to VOD in many respects. Indeed, the RS-DVR Service is essentially nothing more than a VOD system in which all network programming is made available for copying and later viewing "on demand". The comparison between the RS-DVR Service and VOD presents obvious difficulties for Cablevision — even Cablevision acknowledges that VOD transmission requires a license. Yet, Cablevision has refused Turner's offer to enter into licensing discussions to include the Turner networks in the RS-DVR Service, and instead seeks to benefit financially from Turner's copyrighted programming without authorization. (*See infra* pp. 10-11.)

STATEMENT OF FACTS

A. The Parties

It is undisputed that Turner produces, creates, licenses and promotes some of the most popular and well-known television programming in the United States. CNN owns the copyrights to numerous programs aired on the CNN family of networks (CNN, Headline News, CNN en Español and CNN International), including *Larry King Live*, *Anderson Cooper 360°* and *Lou Dobbs Tonight*. (Statement of Facts or "SoF" ¶¶ 2, 7.)[1] The Cartoon Network owns the copyrights to numerous programs aired on the network of the same name, including popular animated programming for children and adults such as *Codename: Kids Next Door*, *Camp Lazlo* and *Aqua Teen Hunger Force*. (SoF ¶¶ 1, 8.) CNN and The Cartoon Network have applied for and obtained copyright registrations for these programs. (SoF ¶¶ 7, 8.)[2]

As with most content providers, Turner's programming is a core asset. Turner's business is centered on exploiting the value of that programming in all media. (SoF ¶¶ 11-19.) Turner licenses its programming for transmission as "linear networks" — *i.e.*, traditional television in which programs are aired in sequence at set times of day — by all major cable operators, including Cablevision, as well as by direct broadcast satellite companies such as DirecTV and EchoStar (the Dish Network). (SoF ¶¶ 9, 44.) Turner separately licenses certain content for transmission as VOD, and for sale in packaged media, such as DVDs, for distribution over the Internet, on cell phones and other technologies.[3] (SoF ¶¶ 11-19.)

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[1] All citations to the "SoF" refer to Plaintiffs' Statement of Material Facts submitted herewith.

[2] TBS, TNT, TCM and TNS were brought into this litigation as third-party defendants. TCM and TNT both own and operate networks of the same name. TBS indirectly owns and operates the TBS network, and is the direct or indirect parent of all the other Turner entities named in this suit.

Cablevision is a large cable operator with over three million subscribers in the New York City metropolitan area, which carries a number of Turner's linear networks, including the Cartoon Network and CNN. (SoF ¶¶ 20-22.) Apart from its network offerings, Cablevision offers VOD on several bases, including pay-per-view VOD, "free" VOD (in which subscribers pay nothing beyond the regular monthly cable bill) and subscription VOD (referred to as "SVOD", in which subscribers pay a monthly fee for access to certain content). (SoF ¶¶ 23-25.)

B. The Contractual Relationship Between Cablevision and Programmers

All of the facts relating to Cablevision's contractual relationships with programmers are beyond reasonable dispute. Cablevision enters into licensing agreements with content providers, such as Turner, for the right to transmit television programming (in the form of television signals) to Cablevision's subscribers. (SoF ¶ 26.) These licenses are typically conveyed in written contracts, often called "affiliation agreements". (SoF ¶ 27.) Cablevision has entered into affiliation agreements with Turner granting Cablevision a license to transmit certain Turner networks as linear networks. (SoF ¶ 28.) Cablevision concedes that its access and rights to programming on Turner networks are narrowly defined and entirely a function of these affiliation agreements. (SoF ¶ 29.)

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[3] CNN Pipeline (www.CNNpipeline.com) and Toonami Jetstream (www.toonami-jetstream.com) are examples of how CNN and The Cartoon Network transmit live and recorded video programming over the Internet. (SoF ¶¶ 15, 16.) As another example, CNN and The Cartoon Network license Apple's iTunes to offer recorded programs for download. (SoF ¶ 17.)

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No provision of these affiliation agreements, or any other contract, authorizes Cablevision to copy or transmit programming as part of the RS-DVR Service. (SoF ¶ 43.) Cablevision concedes that in order to transmit programming belonging to content providers on demand — whether as pay-per-view VOD, free VOD or SVOD — it must have a license to do so. (SoF ¶¶ 38, 39.) Indeed, Cablevision has contracted with a number of content providers for the right to transmit programming as VOD. (SoF ¶ 38.) These license agreements include the essential terms of Cablevision's rights to use the programming, including the specific programs licensed for VOD, the duration of the license, Cablevision's content protection obligations, and, of course, the economic terms. (SoF ¶ 40.) Cablevision agrees, however, that it has no license agreement with Turner for any form of VOD programming. (SoF ¶ 42.)

C. How Cablevision Transmits Linear Networks and VOD Programming

The record is clear and unambiguous with respect to Cablevision's transmission of linear network and VOD programming. Cablevision receives both linear network and VOD programming content at a central facility called a "head-end". (SoF ¶ 45.) Turner sends its linear networks' signal to Cablevision via satellite. (SoF ¶ 46.) Cablevision then transmits those signals over the cable system, so that its subscribers can view the linear networks in their homes. (SoF ¶ 47.) Because Cablevision transmits linear network feeds to its subscribers in real time, it need not — and does not — make a copy of the programming it receives for transmission as a linear network. (SoF ¶ 48.) All of these transmission activities are governed by Turner's affiliation agreements with Cablevision. (SoF ¶¶ 31, 35.)

Cablevision groups its subscribers into geographic groups called "nodes". (SoF ¶ 49.) The concept of "nodes" is relevant to Cablevision's transmission of RS-DVR Service programming and its violation of Turner's exclusive right of public performance. (*See infra* pp. 18-19.) The same programming signal is transmitted to all subscribers in the node, but they may not all be able to view each program. (SoF ¶ 50.) For example, if one individual in a node subscribes to a premium cable network such as HBO, and another does not, the signal for HBO is transmitted to both, but only the HBO subscriber's set-top box will be able to decode the signal.

Cablevision receives VOD programming differently from how it receives linear network programming. The transmission and receipt of programming for VOD is also governed by contract. (SoF ¶¶ 38-39.) Because VOD programming is intended to be viewed at different times, "on demand", content providers send VOD programming to cable operators not in real time, but on a periodic basis pursuant to agreed-upon licenses. (SoF ¶ 51.) The cable operator then stores the VOD programming as digital files on computer servers at the head-end. (SoF ¶ 52.) To facilitate storage and transmission, VOD programming must be in a format known as "constant bit rate". (SoF ¶¶ 53-55.) In the context of this lawsuit, the concept of "constant bit rate" is relevant to Cablevision's processing and copying of programming for its RS-DVR Service. (*See infra* p. 8.)

Cablevision transmits VOD programming to its subscribers over its cable lines on a particular dedicated "bandwidth" (or radio frequency), separate from the bandwidth used to transmit linear networks. (SoF ¶ 57.) Because bandwidth is limited, only a given number of subscribers in a node can view VOD programming at any one time. (SoF ¶ 60.) If too many subscribers request VOD programming at a time, some will receive an error or "please try again" message. (*Id.*)

D. Digital Video Recorders

Digital video recorders ("DVRs") — sometimes referred to as personal video recorders ("PVRs") — are in-home consumer devices, similar to videocassette recorders ("VCRs"), that are connected directly to the television and can copy television programming. (SoF ¶ 61.) In 1999, a device branded as TiVo became the first commercially available DVR. (SoF ¶ 62.) There is no dispute that with a DVR, as with a VCR, the recording and playback of programming take place inside the user's home and are under his or her exclusive control. The user directs the DVR to record programming, which can come from a linear network feed or from another source. (SoF ¶ 63.) The copied program is stored on the hard drive inside the user's DVR in the user's home.

(SoF ¶ 64.) At a later time, the user directs the DVR to play back the copied program stored on the internal hard drive within his or her home, and display it on the television within his or her home. (SoF ¶ 65.) At no point in this process is programming stored or transmitted outside of the user's home. Many cable operators, including Cablevision, offer their subscribers set-top boxes that have DVR technology embedded within them. (SoF ¶ 67.) These devices are referred to as "set-top DVRs". (SoF ¶ 66.)

E. Cablevision's "RS-DVR" Service

While the parties' characterization of the legal implications of the RS-DVR Service may be open to debate, the facts regarding how that Service operates are not. Cablevision proposes to offer to the public, for a fee, a service it calls the "RS-DVR". (SoF ¶¶ 68-69.) Despite its name, however, the RS-DVR Service is not a DVR. It is a commercial service in which Cablevision would use a complex system of computer hardware and software (1) to make unauthorized copies of copyrighted programs and store those copies at Cablevision's head-end facility, and (2) to transmit the stored programs to subscribers on demand over Cablevision's cable system. (SoF ¶¶ 85-116.) Cablevision concedes that it hopes to profit from the Service and enhance its competitive position vis-à-vis satellite distributors. (SoF ¶¶ 70-71.)

Cablevision designed and built the RS-DVR Service. (SoF ¶ 73.)

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Cablevision would operate, maintain and market the RS-DVR Service for a fee to subscribers. (SoF ¶¶ 69, 77-81, 84.)

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It is self-evident that no subscriber has played any role in the conception, creation or design of the RS-DVR Service. The Service is solely Cablevision's.

1. How Cablevision copies programming in the "RS-DVR" Service

In order to understand how the reproduction and public performance violations occur in this case, it is necessary to provide a brief technological overview of the RS-DVR Service. The first step in the operation of the RS-DVR Service is for Cablevision to obtain the programming that forms the *raison d'être* of the Service.

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2. How Cablevision transmits programming in the "RS-DVR" Service

Cablevision's method of transmitting programming as part of the RS-DVR Service bears striking similarities to its method of transmitting VOD programming.

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For these reasons, the RS-DVR Service is essentially a form of VOD. The only significant differences between VOD and the RS-DVR Service are that the RS-DVR Service is unlicensed, and content providers, such as Turner, have lost control over their programming.

Although Cablevision now tries to deny that the RS-DVR Service is a form of VOD, Cablevision's COO, Tom Rutledge, publicly described the RS-DVR Service that is the subject of this lawsuit as based on a "VOD platform [that] lends itself to a variety of uses". (SoF ¶ 119.)

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In an obvious effort to distance the RS-DVR Service from its close genealogical roots in VOD, Cablevision has deliberately designed the RS-DVR Service so that the subscriber experience in using the Service "mimics" the look and feel of an in-home set-top DVR. (SoF ¶ 130.)

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F. Cablevision Refuses to Negotiate a License for the "RS-DVR" Service

When originally contemplating "a network-based alternative to the in-home DVR experience", Cablevision understood that such a service would require licenses from content providers. In an interview in 2004, Cablevision's head of programming, Mac Budill, stated "*With support from our programming partners*, we think that we can offer a [network-based] service to our customers that . . . [is] complementary to the interests of copyright holders and programmers." (SoF ¶ 140 (emphasis added).)

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Between 2004 and 2006 Cablevision changed its mind about whether it would need a license for a network-based service. On March 21, 2006, Cablevision sent letters to 89 content providers informing them of Cablevision's intended trial and launch of the RS-DVR Service. (SoF ¶ 144.) REDACTED (SoF ¶ 145.) Turner proposed to enter into licensing discussions for the Service, but Cablevision refused. (SoF ¶¶ 146-147.)

G. Procedural History

The Cartoon Network and CNN filed a complaint in this action on May 26, 2006. On June 7, 2006, the parties agreed to co-ordinate, for discovery purposes, with a similar action brought against Cablevision by several major studios (No. 06 CV 3990). At that time, Cablevision stipulated that (1) "it will not be asserting a 'fair use' defense against claims for direct infringement"; and (2) it would not launch the RS-DVR Service "pending resolution by the Court of the question of liability in this action".

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "where the moving party demonstrates that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law". *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 90 (2d Cir. 2002). Courts routinely grant summary judgment in favor of copyright-holders in infringement actions. *See, e.g., Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 260 (2d Cir. 2005).

ARGUMENT

To establish a *prima facie* claim of copyright infringement, the Plaintiffs (CNN and The Cartoon Network) must demonstrate (i) ownership of, or exclusive licenses to, copyrighted works, and (ii) unauthorized "copying". *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992). "Copying" in this instance "is shorthand for the infringing of any of the copyright owner's five exclusive rights, described at 17 U.S.C. § 106". *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 210 (E.D.N.Y. 1994) (citation omitted). It is well-established that copyright infringement is a strict liability offense. "Intention to infringe is not essential under the [Copyright] [A]ct." *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931).

The first element of copyright infringement — CNN's and the Cartoon Network's ownership of, or exclusive licenses to, copyrighted programming — is undisputed. CNN and The Cartoon Network have filed for and obtained copyright registrations for, *inter alia*, all of the programs recited in the Complaint. (SoF ¶¶ 7, 8.) With regard to the second element — unauthorized "copying" — it is undisputed that Cablevision does not have authorization from CNN or The Cartoon Network to "copy" any of this programming, and indeed has refused even to enter into licensing discussions for its RS-DVR Service. (SoF ¶¶ 43, 146-147.) Thus, the only question is whether as part of the RS-DVR Service, Cablevision would in fact "copy" the programming.

The "copying" at issue in this lawsuit relates to at least two of the exclusive rights conferred on CNN and The Cartoon Network by Section 106 of the Copyright Act — the rights of reproduction and public performance. 17 U.S.C. § 106(1), (4). A third exclusive right — the right to distribute copyrighted programming pursuant to 17 U.S.C § 106(3) — is also implicated to the extent that Cablevision contends that the copies are in its subscribers' possession. As set forth below, Cablevision cannot have it both ways: It is either transmitting or distributing copyrighted programming; it is simply impossible for it to be doing neither. Accordingly, under any circumstances, the RS-DVR Service infringes on Plaintiffs' copyrights as a matter of law.

In its Answer, Cablevision asserted no affirmative defenses, and by stipulation affirmatively waived any "fair use" defense. Accordingly, if CNN and The Cartoon Network make out a *prima facie* case for infringement, they must prevail on this motion as a matter of law.[4]

I. CABLEVISION MAKES UNAUTHORIZED COPIES OF PLAINTIFFS' COPYRIGHTED PROGRAMMING IN VIOLATION OF 17 U.S.C. § 106(1)

In operating the RS-DVR Service, Cablevision makes multiple unauthorized copies of copyrighted television programming. In order to make these copies, as set forth above, Cablevision must engage in an unauthorized reconfiguration of Plaintiffs' linear network feed. (*See supra* p. 8.) The copies Cablevision makes from this reconfigured programming fall into two categories: (1) a complete copy of a program for each Cablevision subscriber who requests that Cablevision make a copy, with each copy stored indefinitely on Cablevision servers, and (2) copies of portions of television programming stored temporarily in the memory of Cablevision servers (known as "buffer copies") that are made incident to an unlicensed use.

A. Cablevision Makes Unauthorized Copies and Stores Them Indefinitely

Cablevision concedes that as part of its RS-DVR Service complete copies of copyrighted programming are made onto hard drives in the Arroyo server at Cablevision's head-end facility. (SoF ¶ 103.) Cablevision attempts to avoid liability by contending that the subscriber, not Cablevision, makes the copies at issue. This is demonstrably untrue. Cablevision's support for its arguments hangs on a single fact: the subscriber uses a remote control to request that Cablevision copy a particular program. In a prototypical case of the tail wagging the dog, Cablevision would have the subscriber's pushing of buttons on the remote control transfer all responsibility for reproduction to the subscriber. The law provides for no such transfer.

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[4] Plaintiffs' establishment of a *prima facie* case on Counts I and II also requires dismissal of Cablevision's counterclaims and third-party claims based on the same facts.

Businesses that fulfill customer requests for unauthorized copies cannot avoid liability for infringement. For instance, courts have consistently held that copy shops, such as Kinko's, are liable for infringing copies that they make, even if those copies are made at the request of professors or students. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530-35 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1385-91 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997). Although customers may direct a copy shop to copy materials — just as Cablevision claims its subscribers are doing — the business that actually makes the infringing copies, whether Cablevision or Kinko's, is responsible for its own acts of reproduction. That is so even if the customer himself or herself might not be subject to liability if the customer were the one actually doing the copying because he or she might have a "fair use" defense. *See Basic Books*, 758 F. Supp. at 1532; *Princeton Univ. Press*, 99 F.3d at 1386 n.2.

The same result has been reached in cases involving businesses that allow customers to use in-store equipment to copy sound recordings onto blank audio tapes. *See RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988); *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 337-38 (S.D.N.Y. 1984); *Elektra Records Co. v. Gem Elec. Distribs., Inc.*, 360 F. Supp. 821, 823 (E.D.N.Y. 1973).[5]

Cablevision's attempt to shift responsibility for its own infringing actions onto subscribers fails for another reason as well — this is not an inquiry in which *either* Cablevision *or* its subscribers (but not both) can be held responsible for the infringements at issue. The law is clear that more than one party may be responsible for the same infringement, provided each party's conduct causes the infringement. *See, e.g., New York Times Co. v. Tasini*, 533 U.S. 483, 498, 506 (2001) (holding that both print publishers and operators of online databases were liable for infringing copies available on the databases).

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[5] In *Elektra*, for example, the defendant argued that it could not be responsible for the copies made by its customers because the copying was "individual and self-service", but the court held that when the infringing copies were made on the store's equipment, on the store's premises, using copyrighted material made available to the consumer by the store, the store was itself liable for the infringements. 360 F. Supp. at 823-24.

Finally, throughout its Answer to the Complaint, Cablevision tries to avoid responsibility for its unauthorized copying by analogizing the RS-DVR Service to VCRs and DVRs, consumer devices for copying television programming — and claiming that the *Sony/Betamax* case protects such devices. (*See, e.g.*, Answer at 2 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).) But *Sony* is inapplicable here. First, to the extent that Cablevision refers to a "fair use" defense arising out of *Sony*, it waived that argument by stipulation entered by this Court as part of its Order of June 7, 2006. Second, the facts here and those at issue in *Sony* are entirely different. Here, in the context of the RS-DVR Service, Cablevision not only would supply the copying equipment (as Sony did), but would (1) actually do the copying, (2) supply the copyrighted works, and (3) perform these services for commercial gain using equipment located on its premises. The RS-DVR Service is not merely a device, it is a copying service. Unlike *Sony*, where Sony "had no direct involvement with any infringing activity", *id.* at 447, Cablevision would have direct involvement with each infringing reproduction and each infringing transmission by virtue of activities that occur on Cablevision's premises. Unlike *Sony*, where the only interaction between Sony and the Betamax user was the point of sale, Cablevision has an ongoing service relationship with its RS-DVR Service subscribers. Unlike *Sony*, where Sony did not provide the copyrighted content, but only the means by which to copy it, Cablevision is the one who — based on its access to television programming for the limited purpose of simultaneous transmission as part of the linear feed — is making the works available for copying. And, finally, Cablevision's activities are neither "private", "noncommercial" nor "in the home".

Id. at 442. Accordingly, Cablevision violates CNN's and The Cartoon Network's exclusive reproduction right under 17 U.S.C. § 106(1).[6]

B. Cablevision Makes Unauthorized Temporary Copies Not Associated With Any Individual Subscriber Request

In addition to the copies that Cablevision makes in response to each subscriber request and stores indefinitely on hard drives at its head-end facility, Cablevision makes temporary infringing copies in the memory of several computers involved in its RS-DVR Service, which copies are not incident to any licensed use.[7] Some of these unauthorized "buffer copies" are not associated with any individual subscriber request, and therefore are not subject to Cablevision's alleged defense that subscribers (and not Cablevision) make the copies.

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[6] Congress has demonstrated its awareness of situations in which businesses may make infringing copies at the request of their users. In certain discrete circumstances not applicable here, but which provide useful frameworks for considering this case, Congress has addressed liability for user-initiated copies and carved out very limited exceptions and protections. Notably, in creating these statutory carve-outs, Congress imposed limitations to protect the interests of copyright-holders. None of the carve-outs provides the type of *carte blanche* for user-initiated conduct that Cablevision seeks from this Court. Two statutory provisions are illustrative in this regard: 17 U.S.C. § 108(d)-(e) and § 512. Section 108(d)-(e) creates an exception for user-initiated copies of works made by libraries or archives. To qualify for this exception, before copying an entire work, a library or archive must make an affirmative determination "on the basis of a reasonable investigation" that a copy cannot otherwise be obtained at a "fair price". Section 512 of the Copyright Act (enacted as part of the DMCA in 1998), creates limitations on the liability of service providers for money damages in connection with certain user-initiated actions. In order to take advantage of Section 512's limitations on liability, however, the "service provider" (a defined term *that does not include cable operators*) must take a number of steps to respond to legitimate interests of the copyright-holder. 17 U.S.C. § 512. Both of these provisions protect limited user-initiated copying under carefully circumscribed circumstances that directly take into account the interests of copyright-holders.

[7] While buffer copies may be made as part of an authorized transmission of programming feed, the buffer copies made by Cablevision as part of the RS-DVR Service are unlicensed and unauthorized.

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The buffer copies created by Cablevision are infringing reproductions. It is well-established that reading or loading digital information into a computer's random access memory (or "RAM") — as Cablevision does each time it creates a buffer copy — creates a "copy" within the meaning of the Act. *See Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 100-102 (D.C. Cir. 1998); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).[9] Thus, even if compliance with a subscriber request were somehow a defense to a claim of copyright infringement — which it is not — Cablevision nonetheless violates CNN's and The Cartoon Network's exclusive reproduction rights under 17 U.S.C. § 106(1) by making copies not associated with any individual subscriber request.

II. CABLEVISION MAKES UNAUTHORIZED TRANSMISSIONS OF PLAINTIFFS' COPYRIGHTED PROGRAMMING IN VIOLATION OF 17 U.S.C. § 106(4)

Under the Copyright Act, CNN and The Cartoon Network, as the copyright-holders, have the exclusive right to "perform [their] copyrighted work publicly". 17 U.S.C. § 106(4). In its

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[9] In the Digital Millennium Copyright Act of 1998 ("DMCA"), Congress added a provision immunizing RAM copies from copyright liability if used for computer maintenance or repair. 17 U.S.C. § 117(c). This provision overrules the holding of *MAI v. Peak* on its facts (involving computer repair), but confirms the more general point that RAM copies are infringing "copies".

RS-DVR Service, Cablevision infringes on this right by transmitting programming to subscribers for viewing on demand. Cablevision will make those transmissions in the same way as it makes transmissions for its VOD service, subject to one crucial distinction — Cablevision's RS-DVR Service transmissions are unlicensed.

There is no doubt that "[c]able transmissions are recognized as public performances under § 106(4)". *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 179 n.9 (2d Cir. 1986). The term "transmit" means "to communicate [a performance or display] by any device or process whereby images or sounds are received beyond the place from which they are sent". 17 U.S.C. § 101. Plainly, as part of its unlicensed RS-DVR Service Cablevision "transmits" the stored programming from its head-end to subscribers, just as Cablevision does in making its licensed transmissions of VOD programming. (*See supra* pp. 9-10.)

The Copyright Act provides that a transmission is made "publicly" if it is made "to the public", regardless "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times". 17 U.S.C. § 101 (definition (2) of "publicly"); *see also* H.R. Rep. No. 94-1476, at 64-65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678. Cablevision's subscribers receive the same "public performance" whether they view the original, real-time transmission, or a later transmission as part of the RS-DVR Service. Here, the public nature of the transmissions in the RS-DVR Service is underscored by the fact that

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Further, even if each RS-DVR transmission is considered as a separate transmission to a single subscriber, the transmissions are still "public performances". To determine whether a transmission is made "to the public", courts do not look to the number of people who receive the transmission, but rather to the relationship between the party making the transmission and the party receiving the transmission. *See Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1019-20 (7th

Cir. 1991); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002), *aff'd*, 342 F.3d 191 (3rd Cir. 2003), *cert. denied*, 540 U.S. 1178 (2004); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). When, as in this case, the relationship between the party making the transmission (Cablevision) and the party receiving the transmission (a Cablevision subscriber) is a commercial one, courts have consistently held that the transmission is made "to the public". Here, the RS-DVR Service would be offered to all Cablevision subscribers. (SoF ¶ 68.) Just as responding to a user request is no defense to an infringing reproduction of copyrighted material (*see supra* pp. 14-15), it is no defense to an infringing transmission of copyrighted material. As the court stated in *On Command*, "[t]he fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial". 777 F. Supp. at 790.[10]

III. CABLEVISION IS AT LEAST ENGAGED IN UNAUTHORIZED DISTRIBUTION

In its Answer, Cablevision repeatedly claims it is not copying or transmitting Plaintiffs' copyrighted works — its subscribers are. As set forth above, Plaintiffs strongly disagree. However, even assuming *arguendo* that this is not the case, Cablevision is nonetheless liable for infringing on Plaintiffs' exclusive distribution right. 17 U.S.C. § 106(3). If the copies of copyrighted programming on hard drives in Cablevision's servers were to belong to subscribers (as Cablevision contends), then Cablevision's physical distribution of those copies to subscribers

[10] The Second Circuit found copyright infringement in an analogous situation in *Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998). There, the defendant operated a service called "Media Dial-Up", whereby a subscriber could place a telephone call to radio receivers owned by the defendant, which were located in different cities around the country. In response to the subscriber's entries on a touch-tone telephone, the receiver would tune to the requested radio station and transmit it over the telephone line to the subscriber. *Id.* at 106. The court found the defendant liable for copyright infringement even though each receiver transmitted only to a single subscriber over a telephone connection to which no one else had access. *See Infinity Broad. Corp. v. Kirkwood*, 965 F. Supp. 553, 555 (S.D.N.Y. 1997) (defendant did not deny that his "actions constitute public performance").

constitutes infringement as a matter of law. *See Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 299-300 (3d Cir. 1991), *cert. denied*, 502 U.S. 939 (1991); *Psihoyos v. Liberation, Inc.*, No. 96 Civ. 3609, 1997 WL 218468, at *2 (S.D.N.Y. Apr. 30, 1997); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 989 (D. Minn. 1986). As part of the RS-DVR Service, Cablevision's provision to its subscribers of copies of copyrighted programming — if not an infringing transmission — must be a distribution. *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *cf. Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 324-26 (2d Cir. 1995).

CONCLUSION

Notwithstanding its complete involvement in every aspect of the Service, Cablevision wants to be absolved from any and all liability. It copies, but says it is not the copier. It transmits to the public, but says it is not the transmitter. By its own logic it distributes copies, but it will no doubt claim that it is not the distributor. Cablevision's arguments are classic sophistry, and the translation from the Greek is simply this: "I want to use, but I don't want to pay."

For all of the foregoing reasons, Turner respectfully requests that this Court grant its Motion for Summary Judgment.

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Respectfully submitted,

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By [signature]

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